

comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before November 21, 2016. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <http://www.ftc.gov/ftc/privacy.htm>.

By direction of the Commission.

Donald S. Clark,
Secretary.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, and 19

[FAR Case 2013-018; Docket No. 2013-0018, Sequence No. 1]

RIN 9000-AM90

Federal Acquisition Regulation: Clarification of Requirement for Justifications for 8(a) Sole Source Contracts

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to clarify the guidance for sole-source 8(a) contract awards exceeding \$22 million. **DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before January 17, 2017 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2013-018 by any one of the following methods:

- *Regulations.gov*: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "FAR Case 2013-018" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "FAR Case 2013-018." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2013-018" on your attached document.

- *Mail*: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2013-018, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, via email at mahruba.uddowla@gsa, or telephone at 703-605-2868, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2013-018.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to further clarify guidance for justifications of 8(a) sole-source contract awards in excess of \$22 million. This proposed rule responds to the recommendations made by the Government Accountability Office (GAO) in its report, GAO-13-118, "Slow Start to Implementation of Justifications for 8(a) Sole-Source Contracts." The GAO report focuses on the revisions made to the FAR to implement section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) (see 77 FR 23369). Section 811 established the requirement that the head of an agency may not award a sole-source 8(a) contract for an amount exceeding \$20 million (subsequently updated to \$22 million) unless—

- The contracting officer justifies the use of a sole-source contract in writing;
- The justification is approved by the appropriate official designated to approve contract awards for dollar amounts that are comparable to the amount of the sole-source contract; and
- The justification and related documentation are made available to the public in accordance with 10 U.S.C. 2304(f)(1)(C) and (l), and 41 U.S.C. 253(f)(1)(C) and (j) (recodified at 41 U.S.C. 3304(e)(1)(C) and (f)), as applicable.

The FAR Council published an interim rule in the **Federal Register** at

76 FR 14559 on March 16, 2011 implementing section 811 requirements. The interim rule was subsequently adopted without change as a final rule and published in the **Federal Register** at 77 FR 23369 on April 18, 2012. Prior to publication of the rule, three tribal consultations were conducted in the Fall of 2010 to address the implementation of section 811.

On December 12, 2012, the GAO released its report regarding the use of the of the sole-source 8(a) justification across the Federal Government. The GAO-13-118 report indicates that the FAR needed additional clarification of justification and recommended that clarifying guidance is needed to help ensure that agencies are applying the justification requirement consistently. The GAO report recommended that OFPP, in consultation with the FAR Council, promulgate guidance to clarify the circumstances in which an 8(a) justification is required. As recommended, OFPP and the FAR Council agree to clarify the FAR with guidance that will:

- Clarify whether an 8(a) justification is required for 8(a) contracts that are subject to a pre-existing Competition in Contracting Act of 1984 (Pub. L. 98-369) (CICA) class justification.
- Provide additional information on actions contracting officers should take to comply with the justification requirement when the contract value rises above or falls below \$22 million between the Small Business Administration's (SBA's) acceptance of the contract for negotiation under the 8(a) program and the contract award.
- Clarify whether and under what circumstances a separate sole-source justification is necessary for out-of-scope modifications to 8(a) sole-source contracts.
- This rule does not expand on the requirements of section 811. The intent of the proposed rule is to further clarify the processes and procedures in the FAR to ensure uniform, consistent, and coherent guidance regarding the use of sole-source 8(a) justifications.

II. Discussion and Analysis

The following is a summary of the proposed FAR amendments associated with this rule:

A. Clarify Whether an 8(a) Justification Is Required for 8(a) Contracts That Are Subject to a Pre-Existing CICA Class Justification

The proposed rule will clarify that a justification executed under any other authority cannot be substituted for a sole-source 8(a) justification.

B. Provide Additional Information on Actions Contracting Officers Should Take To Comply With the Justification Requirement When the Contract Value Rises Above or Falls Below \$22 Million Between SBA's Acceptance of the Contract for Negotiation Under the 8(a) Program and Contract Award

The current requirement in the FAR to prepare and approve the sole-source 8(a) justification prior to negotiation remains intact to ensure that the justification “. . . is executed prior to negotiation, a critical juncture in the contract award continuum” (77 FR 23369). However, the FAR will be amended to clarify the appropriate actions contracting officers should take in the event the estimated contract value rises above or falls below \$22 million prior to award. DoD, GSA and NASA propose to add the following:

- If the estimated contract value at the time of submission of the offering letter exceeds \$22 million, include the approved justification with the offering letter.
- If the estimated contract value at the time of submission of the offering letter is less than or equal to \$22 million, but the contract value at time of award exceeds \$22 million, send the approved justification prior to contract award.

C. Clarify Whether and Under What Circumstances a Separate Sole-Source Justification Is Necessary for Out-of-Scope Modifications to Sole-Source 8(a) Contracts

At FAR 43.102, the FAR provides guidance to contracting officers acting within the scope of their authority. In general, if the modification to the contract is out of scope, then it would be considered a new contract and would therefore, need to go through the appropriate procurement process for a new contract. Agencies' contracting officers use their discretion to determine if a modification is within the scope of the original contract.

D. Other Changes

Conforming changes were proposed to part 6 and subpart 19.8. Other minor editorial clarifications were made.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any new requirements, limitations, or restrictions on small businesses. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

The proposed rule responds to the recommendations made in GAO-113-118 issued on December 12, 2012, to promulgate clarifying guidance in the FAR regarding sole-source 8(a) justifications for contract awards exceeding \$22 million. This clarification pertains to processes and procedures that have already been established in the FAR pursuant to section 811 of the National Defense Authorization Act for Fiscal Year 2010.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements. It does not duplicate, overlap, or conflict with any other Federal rules. There are no known alternatives which would accomplish the stated objectives of the applicable statutes.

DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2013-018), in correspondence.

VII. Paperwork Reduction Act

The proposed rule clarifies guidance that implemented section 811, which prohibited the award of a sole-source contract in an amount over \$20 million (subsequently revised to \$22 million) under the 8(a) program authority (15 U.S.C. 637(a)) without the contracting officer first obtaining a written justification and approval approved by an appropriate official and making public the justification and approval and related information (see 76 FR 14559). This clarifying guidance pertains to documentation that is

internal to the Government and does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 5, 6, and 19

Government procurement.

Dated: November 7, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

For the reasons set forth in the preamble, 48 CFR parts 5, 6, and 19 are proposed to be amended as follows:

- 1. The authority citation for 48 CFR parts 5, 6, and 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 5—PUBLICIZING CONTRACT ACTIONS

- 2. Amend section 5.406 by adding paragraph (d) to read as follows:

5.406 Public disclosure of justification documents for certain contract actions.

* * * * *

(d) Sole-source 8(a) justifications for awards exceeding \$22 million shall be posted in accordance with 6.305.

PART 6—COMPETITION REQUIREMENTS

- 3. Amend section 6.204 by revising paragraph (b) to read as follows:

6.204 Section 8(a) competition.

* * * * *

(b) No separate justification or determination and findings is required under this part to limit competition to eligible 8(a) contractors except for sole source 8(a) awards exceeding \$22 million (see 6.302-5 and 6.303-1).

* * * * *

6.302-5 [Amended]

- 4. Amend section 6.302-5 by removing from paragraph (b)(4) “6.303” and adding “6.303-2 and 19.804-3” in its place; removing “over” and adding “exceeding” in its place; and removing “(See subpart 19.8).”

- 5. Amend section 6.303-1 by—

- a. Revising paragraph (b); and
- b. Removing from paragraph (d) “above” and adding “of this section” in its place.

The revisions read as follows:

6.303-1 Requirements.

* * * * *

(b)(1) In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), the contracting officer shall not award a sole-source contract under the 8(a) authority (15 U.S.C. 637(a)) for an amount exceeding \$22 million unless—

(i) The contracting officer justifies the use of a sole-source contract in writing in accordance with 6.303–2; and

(ii) The justification is approved by the appropriate official designated at 6.304; (see 19.804–2(a)(15) and 19.804–2(b) for required information for agency offering letter).

(2) The justification and related information shall be made public after award in accordance with 6.305.

(3) The requirement for a sole-source 8(a) justification and approval shall not be satisfied by any other justification and approval executed under a different authority (e.g., justification and approval in accordance with 6.302–2).

* * * * *

■ 6. Amend section 6.303–2 by—

■ a. Revising the introductory text of paragraph (b);

■ b. Removing from the introductory text of paragraph (d) the word “over” and adding “exceeding” in its place; and

■ c. Revising paragraph (d)(2).

The revisions read as follows:

6.303–2 Content.

* * * * *

(b) As a minimum, each justification, except for sole-source 8(a) contracts exceeding \$22 million (see paragraph (d) of this section), shall include the following information:

* * * * *

(d) * * *

(2) A specification of the statutory provision providing the exception from the requirement at 19.805–1(a) to use competitive procedures in entering into the contract (15 U.S.C. 637(a); and 10

U.S.C. 2304(c)(5) or 41 U.S.C. 3304(a)(5)).

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PART 19—SMALL BUSINESS PROGRAMS

■ 7. Amend section 19.804–2 by revising paragraph (b)(3) to read as follows:

19.804–2 Agency offering.

* * * * *

(b) * * *

(3) Sole source requirements, other than construction, should be forwarded directly to the district office that services the nominated firm. If the contracting officer is not nominating a specific firm, the offering letter should be forwarded to the district office servicing the geographical area in which the contracting office is located. For sole-source requirements with an estimated contract value exceeding \$22 million, an approved sole source 8(a) justification (see 6.303–1(b)) shall be included in the agency’s offering letter.

* * * * *

19.804–3 through 10.804–6 [Redesignated]

■ 8. Redesignate sections 19.804–3 through 19.804–6 as sections 19.804–4 through 19.804–7, respectively.

■ 9. Add new section 19.804–3 to read as follows:

19.804–3 Sole-source 8(a) contract awards.

This subsection implements section 811 of the National Defense Authorization Act for Fiscal Year 2010, (Pub. L. 111–84), which requires justification for the award of a sole-source 8(a) contract exceeding \$22 million.

(a)(1) The contracting officer shall not award a sole-source 8(a) contract exceeding \$22 million unless—

(i) The contracting officer has justified, in writing, the use of a sole-

source 8(a) contract in accordance with 6.303–1(b) and 6.303–2(d); and

(ii) The justification has been approved by the appropriate official designated at 6.304.

(2) A copy of the approved justification shall be provided to the SBA District Office identified in the agency’s offering letter (see 19.804–2(a)(15) and 19.804–2(b)).

(i) If the estimated contract value at the time of submission of the offering letter exceeds \$22 million, include the approved justification with the offering letter.

(ii) If the estimated contract value at the time of submission of the offering letter is less than or equal to \$22 million, but the contract value at time of award exceeds \$22 million, send the approved justification prior to contract award.

(b) The justification and related information shall be made public after award, using the procedures at 6.305.

19.805–1 [Amended]

■ 10. Amend section 19.805–1 by removing from the introductory text of paragraph (b) “sole source” and adding “sole-source” in its place.

19.805–2 [Amended]

■ 11. Amend section 19.805–2 by removing from paragraph (a) “19.804–3” and adding “19.804–4” in its place.

■ 12. Amend section 19.808–1 by revising paragraph (a) to read as follows:

19.808–1 Sole source.

(a) The SBA may not accept for negotiation a sole-source 8(a) contract that exceeds \$22 million unless the requesting agency has submitted an approved sole-source 8(a) justification in accordance with the requirements of 6.303–1(b).

* * * * *